

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

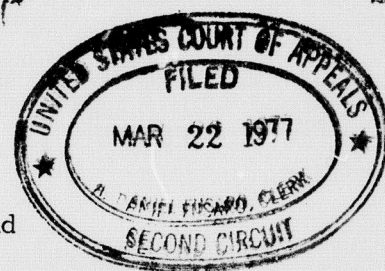
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77-7062

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



ROBERT E. McDONNELL and
ROBERT DeMARTINO,

Plaintiffs-Appellants,

-against-

SOUTHERN VERMONT LAND COMPANY, INC.,
HARRY S. PATTEN, MORTON FREEDMAN,
and PHILIP GRANDE,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CASES.....	ii
I. THE PROCEEDINGS TO DATE.....	1
II. THE FACTS OF THE CASE. EVIDENCIARY HEARING.....	5
POINT I.	
THE DISTRICT COURT HAS JURISDICTION BECAUSE THE DEFENDANTS TRANSACTED BUSINESS HERE PURSUANT TO N.Y., C.P.L.R. §302(a)(1)....	9
POINT II.	
THE DISTRICT COURT HAS JURISDICTION OVER THE DEFENDANTS BECAUSE THE DEFENDANTS COMMITTED TORTIOUS ACTS WITHIN THE JURISDICTION.....	18
POINT III.	
THE DISTRICT COURT HAS JURISDICTION OVER DEFENDANT SOUTHERN VERMONT LAND COMPANY, INC.....	30
CONCLUSION.....	31

TABLE OF CASES

	<u>PAGE</u>
<u>Etten v. Kaufman</u> , (C.A., 3rd) 179 F.2d 302; 13 F.R. Service 54(b) 4 case 5.....	4
<u>Elman v. Belson</u> , 302 N.Y.S.2d 961.....	10
<u>Potters, Photographic Applications Co., v.</u> <u>Eailing Corp.</u> , (D.C., N.Y. 1968) 292 F.Supp. 92.....	15
<u>Krause v. Hauser</u> , (D.C. N.Y. 1967) 272 F.Supp. 594	15
<u>Longines and Wittnauer Watch Co. v. Barnes &</u> <u>Reinecke, Inc.</u> , 15 N.Y.2d 443, 261 N.Y.S.2d 8.....	15
<u>Pallas v. Drive-Rite, Inc.</u> , (D.C., N.Y. 1966) 252 F.Supp. 582.....	15
<u>Stark v. Spitz</u> (1972) 38 A.D.2d 966, 331 N.Y.S.2d 709.....	15
<u>Lehigh Valley Industries, Inc. v. Birenbaum</u> , (C.A. N.Y. 1975) 527 F.2d 87.....	16
<u>Anrea Jewelry Creations, Inc. v. LeSona</u> , (D.C. N.Y. 1972) 344 F.Supp. 179.....	16
<u>Karlin v. Davis</u> , (D.C., N.Y. 1971) 326 F.Supp. 1325.....	17
<u>Bristol Recreation Systems, Inc. v. Contract</u> <u>Furniture Corp.</u> (1972) 39 A.D.2d 639, 331 N.Y.S.2d 197.....	17
<u>Uniroyal, Inc. v. Heller</u> , 65 F.RD. 83 (1974) S.D., N.Y.....	17

TABLE OF CASES
(Page -2-)

	<u>PAGE</u>
<u>Polish v. Threshold Technology, Inc.</u> , 72 Misc.2d 610, 612, 340 N.Y.S.2d 354, 356 (Sup. Ct. 1972).....	18, 20
<u>Murphy v. Erwin-Wasey</u> , 460 F.2d 661, 664 (1st Cir., 1972).....	18, 20
<u>Elman v. Belson</u> , 32 A.D.2d 422, 302 N.Y.S.2d 961...	24, 25
<u>Orient Mideast Lines, Inc. v. Albert E. Bowen, Inc.</u> (D.C., N.Y.) 1969, 297 F.Supp. 1149.....	25
<u>PPS, Inc., v. Jewelry Sales Representatives, Inc.</u> 392 F.Supp. 379 (D.C., N.Y. 1975).....	25
<u>Hodom v. Stearns</u> 1969, 32 A.D.2d 234, N.Y.S.2d 234, 301 N.Y.S.2d 146 (Sup. Ct. App. Div. 4th Dept.....	25, 27
<u>Nelson v. Miller</u> , 143 N.E.2d 681.....	26
<u>American Broadcasting Co. v. Hernreich</u> , 40 A.D.2d 800, 338 N.Y.S.2d 146.....	26
<u>Gasarch v. Ormand Industries, Inc.</u> , 346 F.Supp. 550 (S.D.N.Y., 1972).....	26
<u>Legros v. Irving</u> , 38 App. Div. 2d 53, 327 N.Y.S.2d 371.....	26
<u>Ford v. Unity Hospital</u> 32 N.Y.S.2d 464, 346 N.Y.S. 2d 238.....	26, 27
<u>Frummer v. Hilton Hotels International, Inc.</u> (1967) 19 N.Y.2d 533, 281 N.Y.S.2d 41 N.E.2d 851, Certiorari Denied 88 Supp. Ct. 241, 389 U.S. 923.....	27

TABLE OF CASES
(Page -3-)

	<u>PAGE</u>
<u>Gelfand v. Tanner Motor Tours, Ltd., (C.A. N.Y.</u>	
1967) 385 F.2d 116, Certiorari Denied	
88 S. Ct. 1198, 390 U.S.996.....	27

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
ROBERT E. McDONNELL and
ROBERT DeMARTINO,

Plaintiffs-Appellants, :

--against- :

Docket No: 77-7062

SOUTHERN VERMONT LAND COMPANY, INC.,
HARRY S. PATTEN, MORTON FREEDMAN,
and PHILIP GRANDE,

Defendants-Appellees. :
-----X

BRIEF OF PLAINTIFFS-APPELLANTS

I. THE PROCEEDINGS TO DATE

Plaintiffs caused a summons and complaint, issuing out of the United States District Court for the Eastern District of New York to be personally served upon all four defendants. The complaint [set forth at the Appendix at pages A-3 through A-25], essentially, sought money damages for fraud, civil conspiracy and negligence in connection with the purchase of land by plaintiffs from defendant PATTEN which land was located in the State of Massachusetts. [It was not known to

"A" refers to Appendix followed by Page Number.

plaintiffs at the time of the service of the summons and complaint as to whether SOUTHERN VERMONT LAND COMPANY and/or defendant GRANDE, has an equity interest in the property and participated in the sale as was alleged in the complaint [A-4-6]. GRANDE testified that defendant PATTEN was 100% shareholder of defendant SOUTHERN VERMONT and defendant GRANDE became a shareholder at the "end of July, 1973" [A-65-66]. The complaint also contains a cause of action for rescission, and, in addition, there was a claim against defendant FREEDMAN, an attorney, for malpractice in connection with his legal representation of the plaintiffs in connection with the purchase. Without going into the merits of the claim, essentially, it was plaintiffs' contention that it was represented to them that they were purchasing 300 acres at a purchase price of \$400.00 per acre, when the defendants knew or should have known, that the parcel contained only 200 acres; that there was an intentional misrepresentation by these fraudulent mis-statements as to acreage which induced the plaintiffs to make the purchase and to thereafter close title to the property and pay for same; plaintiffs relied upon

the fraudulent misrepresentations; defendant FREEDMAN was negligent, it is alleged, in not ascertaining and advising the plaintiffs of the difference in acreage. There is a seventh cause of action alleging a civil conspiracy and scheme between all the defendants [A-18-23].

The summons and complaints were served upon all the defendants by United States Marshals in Massachusetts, pursuant to Rule 4(d)(1) of the Federal Rules of Civil Procedure [A-34].

Thereafter, defendants SOUTHERN VERMONT, PATTEN and GRANDE moved pursuant to Rule 12B(1) and (4) to "dismiss the within action" or "quash the return of service" on the grounds that defendants SOUTHERN VERMONT LAND COMPANY, INC., HARRY S. PATTEN and PHILIP GRANDE were "not...subject to service of process within the Eastern District of New York" and "to dismiss this action on the grounds that it is in the wrong District." [The motion and supporting affidavit are set forth in the Appendix [A-28-33]. Defendant FREEDMAN did not join in the motion.

The District Court (Mishler, J.) thereafter directed an evidenciary hearing. The full hearing transcript is set forth in the Appendix [A-47 through A-99]. The exhibits introduced at the hearing are set forth in the Appendix [A-100 through A-121].

After the hearing, the Court dismissed the complaint as against defendants SOUTHERN VERMONT, PATTEN and GRANDE (but not against FREEDMAN who did not join in the motion), and the Court's decision is set forth in full in the Appendix [A-122-132]. The Notice of Appeal was taken. The District Court thereafter issued a Rule 54(b) certification permitting this appeal as is a permitted proper procedure. Etten v. Kaufman, (C.A. 3rd) 179 F.2d 302; 13 F.R. Service 54 (b) 4 case 5; Bender's Federal Practice Forms, Form #3249 and Headnotes thereunder.

II. THE FACTS OF THE CASE.
THE EVIDENCIARY HEARING.

The facts ascertained at the hearing are as follows:

[Some additonal facts will be referred to in the body of the Brief as relevant]. Plaintiffs went to Massachusetts to purchase property pursuant to an appointment made from New York on a telephone call as the result of a prior purchase made by an associate of plaintiffs from New York. [A-71-72; A-14]. They met defendant GRANDE in Massachusetts. After looking at the property plaintiffs signed a purchase agreement (the "agreement") [A-73]. The agreement, a skimpy, one page document, is set forth in the Appendix [A-100]. Plaintiffs when they signed the agreement delivered to defendant GRANDE a check in the amount of \$16,000.00 as a downpayment on a total price of \$160,000.00 with the "balance due seller at passing of title" [A-100].

Plaintiffs had no lawyer at the time that the agreement was signed; defendant GRANDE advised them that he would obtain a lawyer for them (who turned out to be defendant FREEMAN) to which plaintiffs assented [A-73] and GRANDE further advised that he would "come down" to New York "for the closing" [A-73]. Indeed, defendant GRANDE, throughout his entire testimony, when he was not carefully guarding his

his testimony as to the place where the closing transpired, referred to the transaction that took place at LaGuardia airport in New York as a "closing".

On July 13, 1973 defendants GRANDE and FREEDMAN flew to LaGuardia Airport where they met plaintiffs.

While GRANDE carefully couched his testimony indicating that papers were brought down to be signed and brought back to Massachusetts and was vague on the exact documents, plaintiff DeMARTINO, testifying on behalf of the plaintiffs, set forth at length, (totally uncontroverted in the record) all of the transactions which transpired at LaGuardia Airport on July 13, 1973, [which the Court will take judicial notice is in the Eastern District of New York where DeMARTINO himself resided at the time] which were as follows:

(i) plaintiff DeMARTINO testified that both plaintiffs "went over the whole deal again" [A-74]; that they discussed the acreage and "how much per acre"; and that "I [DeMARTINO] brought up the question, how about a title search on acreage and I was informed at that time that Massachusetts did not have such a title" [A-75]; that the purchase price again was reviewed based upon the price of 300 acres at \$400.00 an acre [A-75]; that two warranty deeds for the property were displayed to the plaintiffs already signed by the defendant

PATTEN [A-76; 102-107] and that it was further explained [to plaintiffs] that these deeds "had to be recorded and were taken back". [A-75-77].

(ii) Plaintiff DeMARTINO further testified that both plaintiffs signed a mortgage assumption promissory note to pay the existing mortgage on the premises [A-76, A-108]. (Interestingly enough, the purchase agreement [A-100] was completely silent with respect to any mortgage transaction or assumption of any mortgage agreement.)

(iii) Plaintiff DeMARTINO testified that both plaintiffs signed the loan assumption agreement at the closing in New York [A-78].

(iv) Additionally, plaintiff DeMARTINO testified that, at the closing, he and plaintiff McDONNELL executed a mortgage in favor of PATTEN to secure payment of Mr. Patten's mortgage by plaintiffs [A-109]. This mortgage, signed by plaintiffs at LaGuardia is set forth at the record [A-110-113].

(v) Plaintiff DeMARTINO further testified, to show the extent of the transactions between the parties, that defendant FREEDMAN delivered a "drawing...giving the layout of the land" [A-79] which drawing is reproduced in the appendix [A-114].

(vi) Plaintiff DeMARTINO further testified that FREEDMAN delivered a closing letter indicating that "that on Friday, July 13th [the date of the meeting] you [plaintiffs] are purchasing" the property [A-81, 115].

(vii) Plaintiff DeMARTINO further testified that he received, at the closing at LaGuardia a "tax adjustment schedule" [A-81-82, 117] and had additional conversations with respect thereto [A-82-83].

(viii) Additionally, plaintiff DeMARTINO testified that he received a preliminary title opinion from defendant FREEDMAN [A-84-85, 119] and finally, that plaintiffs were given a bill [A-120] from defendant FREEDMAN which significantly, states, at item A thereof, "New York closing..." [A-120] and that plaintiffs delivered two checks at the closing one in the amount of \$1,034.25 to pay defendant FREEDMAN's bill and the other in the amount of \$80,462.40 for the balance of the cash amount due on the closing price as per the closing adjustments. [A-85].

DeMARTINO testified that it was his understanding that the transactions which took place at LaGuardia constituted a "closing" [A-90], as it was defendant FREEDMAN's understanding as well based upon his own statement in the bill for services rendered.

POINT I

THE DISTRICT COURT HAS JURISDICTION
BECAUSE THE DEFENDANTS TRANSACTED BUSINESS HERE
PURSUANT TO N.Y. C.P.L.R. §302(a)(1).

The District Court has jurisdiction over the defendants against whom the complaint was dismissed (herein referred to as "defendants"); they "transacted business" in the Eastern District of New York and therefore jurisdiction is established pursuant to N.Y. C.P.L.R. §302(a)(1) [A-127] and the District Court erred in deciding otherwise.

Concededly, if jurisdiction is to be established over the defendants in the Eastern District of New York to subject them to service here, the test is governed by the New York Long Arm Statute C.P.L.R. §302.

There was sufficient substantial contact between defendant GRANDE and the Eastern District of New York, even though this was one transaction, to warrant the assertion of personal jurisdiction over the defendants.

As the District Court stated, whether the "activity performed within the State is sufficient to constitute the transaction of business necessarily depends upon a multitude of facts present in the individual case; there is no hard, fast mechanical test that can be employed to quantify the

answer;" and as the Court indicated, and as is the law, "some activity in connection with the matter in suit" is the test Elman v. Belson, 302 N.Y.S.2d 961; "purposeful activity" in the jurisdiction is required.

What plaintiffs do disagree with is the Court's conclusion on the facts of this case.

If the entire transaction is analyzed, it would seem that the bulk of the contacts were within the Eastern District of New York, certainly enough to establish, beyond any preadventure of doubt, that the defendants "transacted business" within the State pursuant to N.Y. C.P.L.R. 302(a)(1).

Of course, there is no denial of the fact that the land was originally "looked at" in Massachusetts and a one page contract of sale was signed there [A-100] and a check was delivered there. Plaintiffs were not, however, represented by counsel when they signed that agreement in Massachusetts and it is also obvious that thereafter the entire balance of the transaction, i.e., the real heart of the matter, the closing and financial arrangements took place in the Eastern District.

Regardless of whether or not it was ever the intention of the plaintiffs to go to Massachusetts to close or for GRANDE

to come to New York to close the fact of the matter is that defendant GRANDE came to New York to close title. The District Court said in its opinion [A-125] that GRANDE called the plaintiffs and asked them to come to Massachusetts for the closing, thus, presumably, making it almost "accidental" that the closing took place in New York. It is difficult to understand how the Court could have reached that conclusion. GRANDE testified [at A-53] that, "I called [plaintiffs] and mentioned everything was all set and I could come down (emphasis supplied) or they could come up and close or whatever they wanted to do..." Thus, there is no testimony in the record whatsoever upon which to base the conclusion that GRANDE had specifically asked them to come up. Indeed, the record is quite clear that GRANDE made is clear that he would either "come up" or "go down" depending upon the plaintiffs' wishes.

DeMARTINO testified (A-73):

"He[Grande] also said if we could not get up there for the closing, he would definitely come down here and we said we would greatly appreciate it, as he was accustomed that the time of coming into New York quite frequently."

Even if DeMARTINO's testimony was totally rejected by the District Court it still leaves GRANDE's testimony that:

"...I'll be happy to come down to New York by airplane." [A-73]

And his additional testimony that he came down on other occasions to pick up checks from plaintiffs' associates [A-63-64].

One could hardly say then that GRANDE was dragged kicking and screaming into the Eastern District of New York.

The New York C.P.L.R. commentaries states as follows:

"Where a non-domiciliary physically comes to New York or sends an agent into the State, it is one of the most concrete manifestations of his purposeful activity in New York. In most cases, it will ill-behoove a defendant who has voluntarily come to New York to transact business for profit, to assert later that New York lacks a sufficient interest to adjudicate a controversy arising out of that transaction or even to claim that the trial in New York would be inconvenient.

Particularly is this true where the defendants presence in New York is to perform as opposed to negotiate or execute, the contract...McKinney's Consolidated Laws of New York Annotated, see 302:10 at pg. 74.

After concluding that it was almost "accidental" that the defendants were in New York, the District Court then proceeded to gloss over the numerous transactions which took place at LaGuardia which constitute what is generally known and accepted by practicing lawyers as a "real estate closing." The defendants attempted to set up the fiction that there

was merely signing of papers in New York and that the closing took place in Massachusetts. It is respectfully submitted that that position is totally untenable, and is belied by all of the things that happened and that even the defendant FREEDMAN in his bill to the plaintiffs characterized the transactions at LaGuardia as a "New York closing". [A-120].

In fact, it is actually difficult to understand how the District Court came to the conclusion that the multitude of activities performed by the defendants in New York State did not constitute the "transaction of any business" within the Eastern District.

In the first place the agreement signed in Massachusetts was completely silent with respect to the terms of the purchase price and how same was to be paid. That entire portion of the closing was consummated in New York where (a) an assumption agreement was signed by defendants as well as a mortgage in favor of the defendant PATTEN to secure the assumption agreement and a copy of PATTEN's mortgage and the Deed was, in fact, displayed to the plaintiffs.

Plaintiffs received a diagram of the property together with a two page single spaced closing letter setting forth the entire terms of the transaction together with a tax adjustment schedule and title opinion. Plaintiffs also received a bill for legal services performed by defendant

FREEDMAN and turned over a check to him at LaGuardia for his fee. Even more significantly they paid the balance due on the purchase price, over \$80,000.00.

Naturally, FREEDMAN was the attorney for the plaintiffs but defendant GRANDE was there in his capacity as the agent for PATTEN on his own testimony set forth in the record:

Question - What was your relationship with
Mr. Patten in this particular
deal?

Answer - I was his agent."
[A-65]

It defies belief that this meeting did not constitute a "closing of title" to the very property in issue. What happened at LaGuardia is what every attorney commonly understands to be a real estate closing. It is well known that Deeds are never delivered at closings. They are taken (generally by the title company) to be recorded. The fact that the deed had to be taken to Massachusetts is conceded (the property was there) but this does not, in any way, make the transaction in New York any less a closing of title.

It constitutes the most tortuous of reasoning to consider that title did not close within the Eastern District. GRANDE came to New York admittedly, by his own testimony as PATTEN's agent for a closing; documents obligating plaintiffs to pay substantial amounts of money were signed and plaintiffs turned over in excess of \$80,000.00.

Clearly, "transacting any business" which imposes personal jurisdiction for acts of non-domicilaries certainly requires substantially less contacts than the old "doing business" test. Potters, Photographic Applications Co. v. Ealing Corp. (D.C. N.Y. 1968) 292 F.Supp. 92. It is difficult to understand how the District Court can conclude that the defendants who obviously came to New York to "make a profit" in a "business transaction" were not "transacting business" in New York for the purposes of the New York Long Arm Statute, and the fact that it was a "single transaction" will not prevent the exercise of jurisdiction. In Krause v. Hauser, (D.C. N.Y. 1967) 272 F.Supp. 549, Judge Mishler himself stated, "Personal jurisdiction exists if the plaintiff's claims are from any business transacted within the state...(emphasis supplied by Judge Mishler) and went on to add that "[A] single transaction in New York, out of which the cause of action has arisen, may satisfy the requirement of the transaction of business provision" citing Longines and Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 261 N.Y.S.2d 8; Pallas v. Drive-Rite, Inc., (D.C. N.Y. 1966) 252 F.Supp. 582; Stark v. Spitz, (1972) 38 A.D.2d 966, 331 N.Y.S.2d 709. (A case closely on point with far fewer contacts with New York State which found jurisdiction).

This Court has previously held that were the agreement was executed in Massachusetts and even where the contract was to be performed in Massachusetts, it did not preclude the finding of meaningful presence in New York based upon substantial negotiations in New York leading to the contracts execution. Lehigh Valley Industries, Inc. v. Birenbaum, (C.A. N.Y. 1975) 527 F.2d 87. In the Lehigh, case (supra) this Court did not find jurisdiction because no adequate proof was established as to the New York negotiations. Any single one of the activities performed at LaGuardia more than meets the "quantum" of business to be transacted to establish jurisdiction. Certainly, the analogy here is clearly applicable. The fact that the closing took place within the State of New York and that with a meaningful part of the entire transaction, occurred in New York, would not deprive New York of jurisdiction although the property itself was located in the State of Massachusetts. It is respectfully submitted that the Lehigh case (supra) is certainly more applicable than Aurea Jewelry Creations, Inc. v. LeSona, (D.C. N.Y. 1972) 344 F.Supp. 179 relied upon by the District Court which is a case concerned with shipping goods into the State. What occurred here was not a "mere execution" of an agreement as in the Aurea case (supra).

A more applicable case is Karlin v. Davis, (D.C., N.Y. 1971) 326 F.Supp. 1325 where the Court said that "negotiations for a conclusion of a contract" within New York are unquestionably a "transaction of business supporting Long Arm jurisdiction."

In Bristol Recreation Systems, Inc. v. Contract Furniture Corp., (1972) 39 A.D.2d 639, 331 N.Y.S.2d 197, a "modification of contract" took place and check was cashed in New York and jurisdiction was obtained. See also the case of Uniroyal, Inc. v. Heller, 65 F.RD. 83 (1974) S.D., N.Y.). Here the check was delivered to the defendants in New York and concededly, could have been cashed or certified here. It is respectfully submitted, that the delivery of the check certainly constitutes an adequate transaction of business so as to establish jurisdiction in the Eastern District of New York. There was no proof adduced one way or the other as to whether or not the check was given to GRANDE or FREEDMAN, but regardless, GRANDE's role was clear; he was the agent for PATTEN; he was in New York to make sure the deal closed, that the plaintiff's signed what had to be signed and that the checks changed hands. Anyone with the slightest experience in a "real estate closing" can draw no other conclusion.

POINT II

THE DISTRICT COURT HAS JURISDICTION OVER THE DEFENDANTS
BECAUSE DEFENDANTS COMMITTED TORTIOUS ACTS
WITHIN THE JURISDICTION.

Under N.Y. C.P.L.R. §302(a)(2) [A-127] jurisdiction is proper because defendant GRANDE made fraudulent representations (i.e., essentially that the property contained 300 acres when there was in reality only 200 acres) during the LaGuardia meeting which induced the defendants into closing title, executing a mortgage assumption and promissory note and turning over a check for over \$80,000.00 to the defendants.

Even if the false statements made were made outside the State, this Court has jurisdiction because "tortious acts" were committed within this State and therefor, pursuant to N.Y., C.P.L.R., §302(a)(2) [A-127] jurisdiction over the defendants was established. Where a defendant knowingly sends into a State a false statement, intending that it should be relied upon for the injury of a resident of the State, he has, for jurisdictional purposes, acted within the State. Polish v. Threshold Technology, Inc., 72 Misc.2d 610, 612, 340 N.Y.S.2d 354, 356 (Sup. Ct., 1972); Murphy v. Erwin-Wasey, 460 F.2d 661, 664 (1st Cir., 1972). But here it is clearer. The alleged false, fraudulent and misleading statements were made here within the Eastern District, were relied upon here, in

the Eastern District and the injury occurred here, in the Eastern District.

The District Court's reasoning as to why no "tortious act" was committed in the Eastern District was that the fraudulent statements concerning the raw acreage;

"were initially uttered when the parties entered into the contract; the basis for computing the total purchase price was established in Massachusetts. Any reliance by plaintiffs on those representations would have occurred, likewise, in Massachusetts. The repetition of those statements in New York cannot be said to have induced plaintiffs to purchase the property. The tort, if any, would have been committed in Massachusetts. Clearly this would not meet the requirement of C.P.L.R. §302(a)(2) that the tortious act be committed within the state." [A-131].

There are several things wrong with this position by the District Court, all of which require reversal of its decision.

First, N.Y. C.P.L.R. §302(a)(2) does not speak about any requirement of "reliance"; there is no requirement that the "tortious act" had to have been relied upon; the only requirement of the statute is that the "tortious act" be "committed" in the jurisdiction [A-62]. GRANDE admitted that he represented to plaintiffs at LaGuardia that there were "300 acres" contained in the property which statement, plaintiffs contended was false, fraudulent and misleading. This then meets the requirement of §302(a), namely the "commission of the tortious act", within the jurisdiction.

Polish v. Threshold Technology, Inc., (supra); Murphy v. Erwin Wasey, (supra).

Second, an even more important, the District Court misunderstood the nature of what really happened at LaGuardia. The Court touched upon it at the hearing when it stated; "The claim, the representation made at LaGuardia, induced the turning over of the money, the balance of the purchase price?" [A-97], but lost track of that point in its decision. The point is that if the false, fraudulent and misleading statements had not been made at LaGuardia airport, as alleged by plaintiffs (and in fact, GRANDE did not deny that he made them [A-95]) then, the plaintiffs might well have not turned over the balance of the purchase price to the defendants' representative at the closing.

Under the terms of the agreement [A-100] to buy the property in Massachusetts there was a liquidated damages clause as follows:

"If buyer defaults, he waives claim to deposit above which becomes the property of the seller and broker, equally, as liquidated damages."

Plaintiffs were not required to close. Had they not closed they only would have lost the deposit. Thus, those fraudulent statements, made at the closing, stand, in and of themselves,

as a separate transaction which took place only in the Eastern District of New York. There was no obligation whatsoever for the buyer to go forward to complete the closing.

Thus, defendant PATTEN could not have maintained an action for specific performance, but would have be relegated to the liquidated damages. The Court's entire argument with respect to the fact that there was no "tortious act committed because there could have been no reliance" in New York since the "reliance" had already taken place in Massachusetts, is in without merit since the plaintiffs obviously could, (and they contend they did) rely on the statements made at LaGuardia, to go through with the transaction, close and sign the assumption agreements and notes, and turn over the balance of the purchase price. This does not mean there was not reliance in Massachusetts, only that there also was reliance in the Eastern District and hence, the tort was committed here.

There was thus both the "tortious act committed" and the "injury" in the Easter District. The allegation in paragraph "22" of the complaint is that the statements were "false, fraudulent and misleading...with the intent to deceive

plaintiffs and induce plaintiffs thereby to enter into the contract for the purchase of all of the real property and to close thereon" (emphasis supplied).

There is no question, the tortious conduct, namely the statements made at the closing at LaGuardia were definitely committed. Upon the cross-examination of GRANDE [at page A-62,] the following question and response took place:

Question - Subject to connecting this up, when you were in New York City, did you in fact have a conversation with them [plaintiffs] in which it was discussed and in which it was related to them that they were buying this property on the basis of \$400.00 an acre for 300 acres?

Answer - Yes. There was mentioned 300 acres at the price of \$400 to \$500 an acre..."

There can be no question but that the alleged false, fraudulent and misleading statements were made in the Eastern District.

Of course, whether or not the statements were in fact false, fraudulent and misleading, or whether or not plaintiffs relied thereon, is an issue that goes to the merits of the case which the District Court carefully and persistently excluded from entering into the record on the evidentiary hearing with respect to jurisdiction. But undeniably, the statements were made in New York City at LaGuardia and plaintiffs went

through with a closing which they did not have to conclude (because of the liquidated damages clause) and it is respectfully submitted that that is enough to establish jurisdiction on the basis of tortious acts committed in the Eastern District and injury to the plaintiffs, namely, signing the promissory note and assumption and turning over the checks and closing. The problem that the Courts often find in §302(a)(2) when applied to commercial tort cases is where the "critical events" took place. Here a well defined "critical event" took place in the District directly resulting in injury.

The District Court's statement that "the repetition of those statements in New York cannot be said to have induced plaintiffs to purchase the property" was wrong as well in that it went to the merits.

The District Court, after excluding the merits of the case from the jurisdictional hearing, proceeded to go to the merits of the matter by determining that the statements made at LaGuardia "cannot be said to have induced plaintiffs to purchase the property." It is respectfully suggested that this is exactly what did happen but, in any event, that is clearly an issue for the trial Court on the merits, i.e., whether or not plaintiffs were induced to make the purchase. The Court ran together the two transactions, i.e., the contract signing and the closing and argued that plaintiffs were induced only once. Obviously,

because of the liquidated damages clause they could have been induced twice - - the tortious act to induce them was committed here by defendants' own admission and plaintiffs were capable of being induced; that is enough to establish jurisdiction.

Finally, with regard to jurisdiction over PATTEN, the District Court stated, without any authority for the proposition, that there is:

"no evidence to show that any alleged fraudulent statements concerning the quantity of land were made with Patten's knowledge or consent, and cannot be considered to be within Grande's scope of authority to act as Patten's broker in the transaction." [A-132].

Again the trial Court went to the merits on the issue of whether or not PATTEN knew or consented. There are no cases cited by the District Court for the above proposition nor has the writer been able to find one. Rather, other Courts have specifically disagreed with District Court's position. There was a clear admission of agency by GRANDE. GRANDE said on the record he was PATTEN's agent [A-65]. At that point the issue of whether or not GRANDE acted within the "scope of authority" is totally irrelevant. In Elman v. Belson, 32 A.D.2d 422, 302 N.Y.S.2d 961, dealing with a "lawyer-client" agency the Court specifically held as follows:

"We do not mean to say that the defendant may not be able to show that his Illinois attorney [the "agent" in that case] acted without his knowledge and consent - - and perhaps even against his express direction, in retaining plaintiffs to pursue the Illinois judgment-debtor in what he believes to have been a vain and illconsidered action. All of this evidence would be properly addressed to the determination on the merits. At this stage of the litigation, we merely hold that New York is a proper forum in which that determination may be made and that, as one commentator has cogently remarked, 'there seems to be no valid reason why a Court should become ensnared in the technical rules of agency in making a just balance between the parties when the circumstances before the Court indicate purposeful activity by the defendant's attorneys in New York presumably for his benefit.'"

Orient Mideast Lines, Inc. v. Albert E. Bowen, Inc., (D.C., N.Y.) 1969, 297 F.Supp. 1149; PPS, Inc. v. Jewelry Sales Representatives, Inc., 392 F.Supp. 379 (D.C., N.Y. 1975).

Defendant PATTEN was "transacting business" through GRANDE the "agent" and therefore was present in the jurisdiction. While PATTEN may indeed have a defense against GRANDE, if in fact GRANDE acted outside the scope of his authority, that is not relevant. Elman v. Belson, (supra); Hodom v. Stearns 1969, 32 A.D.2d 234, 301 N.Y.S.2d 146 (Sup. Ct. App. Div 4th Dept.) There is no question as to the nature of the parties as principal-agent. Once the agency was established, even if the

District Court was correct in its position about "scope of authority" (which plaintiff argues it is not) the burden would have shifted to the defendant PATTEN, at that juncture, to come forward with any testimony to show that the agent had acted outside the "scope of his authority". Once the agency had been established the Plaintiffs met the complete burden of proof on the jurisdictional issue to obtain jurisdiction over principal PATTEN if the agent committed the act, which he did. It is the "act or omission within the State...by an agent, [which] is the basis for the exercise of jurisdiction to then determine whether or not the act or omission gives rise to liability and tort and upon whom such liability falls." Nelson v. Miller, 143 N.E. 2d 681.

GRANDE, was the agent in the transaction and as such, the case law as well settled that GRANDE's action, as agent, confers jurisdiction over PATTEN for the purposes of doing business under the N.Y. C.P.L.R. American Broadcasting Co. v. Hernreich, 40 A.D.2d 800, 338 N.Y.S.2d 146; Gasarch v. Ormand Industries, Inc., 346 F.Supp. 550 (S.D.N.Y., 1972).

There is no requirement that a formal agency relationship is necessary to compute activities against the defendant when he is being sued by a third party; Legros v. Irving 38 App. Div. 2d 53, 327 N.Y.S.2d 371, Ford v. Unity Hospital 32

N.Y.S.2d 464, 346 N.Y.S.2d 238, but even if it were, GRANDE admitted the agency.

The need for a true agency in "doing business cases" has been eliminated. Frummer v. Hilton Hotels International Inc., (1967) 19 N.Y.2d 533, 281 N.Y.S.2d 41, N.E.2d 851, Certiorari Denied 88 Supp. Ct. 241, 389 U.S. 923; Gelfand v. Tanner Motor Tours, Ltd., (C.A.N.Y., 1967) 385 F.2d 116, Certiorari Denied 88 S. Ct. 1198, 390 U.S. 996; McKinney's Consolidated laws of the State of New York, See 302:3 pg. 65.

To be an agent for the purposes of the New York "Long Arm" Statute, it is sufficient that the defendant retain such domination and control over the activities of the agent as to justify a finding that the defendant was transacting business in the State and was deriving monetary gain therefrom. Hodom v. Stearns, (supra) There is no question as to the nature of the relationship between GRANDE and PATTEN. At the evidentiary hearing, even if it were relevant on a jurisdictional hearing, nowhere does PATTEN raise any question that GRANDE performed acts which were not authorized by PATTEN, or outside the scope of his authority. PATTEN was the seller. GRANDE was in New York in his capacity as agent to "transact business"

for "profit" for PATTEN; GRANDE said so: "I was his agent" to close title for real property wherein PATTEN was the seller and thus GRANDE was clearly an agent for PATTEN. In fact, one could not imagine a clearer case than were an agent, like GRANDE comes to the closing with the documents necessary to close on behalf of the seller, PATTEN. To even suggest that this does not confer in personam jurisdiction over PATTEN, if jurisdiction over GRANDE exists, is incredible. There can be no question that the agency tests required by §302 is met.

Thus, plaintiffs argue that they did not have to make any showing on a jurisdictional hearing of whether or not GRANDE acted within or without the "scope of his authority". Assuming however, for the sake of argument that plaintiff had the burden at the jurisdictional hearing, of showing that GRANDE acted within the scope of his authority, the Court's statement that "Plaintiff offered no evidence to show that any alleged fraudulent statements concerning the quantity of land were made with PATTEN's knowledge or consent..." is simply belied by the record. At A-61, GRANDE in testifying on cross-examination stated as follows:

I told them that it was supposed to be 300 acres and we had a map in front of us and the representation on the map, as far as the acreage was concerned...I wasn't positive as to the acreage. I was told by my principal it was 300 acres or so..." (emphasis supplied)

Thus, this destroys any and all arguments advanced by the Court that GRANDE was acting outside the scope of his employment and that argument by the Court totally fails, in view of GRANDE's own statement.

POINT III

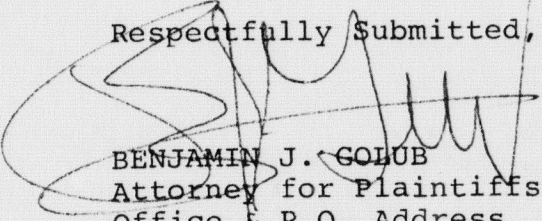
THE DISTRICT COURT HAS JURISDICTION
OVER DEFENDANT SOUTHERN VERMONT
LAND COMPANY, INC.

Defendant SOUTHERN VERMONT was wholly owned by PATTEN at the time of this transaction. GRANDE claimed he was not a partner of PATTEN but he became one "after this transaction and in July of 1973," the month of this transaction. GRANDE became a stockholder in defendant SOUTHERN VERMONT LAND COMPANY, INC [A-66]. While it is true that no evidence was adduced at the evidentiary hearing as to the relationship between SOUTHERN VERMONT, plaintiff alleged in the complaint that it was also one of the sellers. Plaintiff did not have an opportunity to conduct any discovery as to the exact relationship between the three defendants, but clearly the admissions made by GRANDE made it clear that if this Court find jurisdiction over PATTEN and GRANDE they should clearly find it over SOUTHERN VERMONT as well because of the relationship between all parties, as testified to, so that all the necessary parties are before one forum.

CONCLUSION

For all of the foregoing reasons, the decision of the District Court should be reversed and the complaint reinstated against all defendants.

Respectfully Submitted,



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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JULIO VALLEJO, JR., being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 703 REMSEN AVE.
BROOKLYN, N.Y.C.

That on the 22nd day of MARCH, 19 77,
deponent personally served the within BRIEF OF PLAINTIFFS-APPELLANTS

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

~~By leaving true copies of same with a duly
authorized person at their designated office.~~

By depositing TWO true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

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DOLAN, McMAHON & MARTINI
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Sworn to before me this

22nd day of MARCH, 1977.

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978